NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

APPEAL CASE NO.: AR636/2018

THE PREMIER OF KWAZULU-NATAL	FIRST APPELLANT (First Respondent in the court *a quo*)
THE MEMBER OF THE EXECUTIVE COUNCIL FOR THE DEPARTMENT OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS, KWAZULU-NATAL	SECOND APPELLANT (Second Respondent in the court *a quo*)

and

UMNDENI WENKOSI OF THE MKHWANAZI TRADITIONAL COMMUNITY AT MPUKUNYONI	FIRST RESPONDENT (First Applicant in the court *a quo*)
KHETHUKUTHULA DALISA SIPHELELE MKHWANAZI	SECOND RESPONDENT (Second Applicant in the court *a quo*)
MZOKHULAYO MYSON MKHWANAZI	THIRD RESPONDENT (Third Respondent in the court *a quo*)

ORDER

The following order is made:

(1) (a) The appeal is upheld.

(b) There is no order as to the costs of the appeal.

(2) The order of the court *a quo* is set aside and substituted with the following order:

"(a) The application is dismissed.

(b) There is no order as to costs."

J U D G M E N T
Delivered on: TUESDAY, 19 MAY 2020

Olsen J (Moodley J et Chetty J concurring)

[1] This appeal serves before us with leave granted by the Supreme Court of Appeal. The first appellant is The Premier of KwaZulu-Natal. The second appellant is The Member of the Executive Council for the Department of Co-Operative Governance and Traditional Affairs, KwaZulu-Natal. They were respectively the first and second respondents in the court *a quo*, where there was also a third respondent, Mzokhulayo Myson Mkhwanazi. He petitioned the Supreme Court of Appeal separately for leave to appeal and it was refused. He is accordingly cited in these appeal proceedings as the third respondent.

[2] The first respondent in this appeal is cited as Umndeni Wenkosi of the Mkhwanazi Traditional Community at Mpukunyoni. It was cited as such by the deponent to the founding affidavit, Gladness Phumzile Bongekile Mkhwanazi. I have deliberately chosen the words used immediately above to describe the first respondent as it was disputed throughout these proceedings that the deponent to the founding affidavit, and the other nine persons whom she identified as having authorised the launch of the application in the court *a quo*, constitute the Umndeni Wenkosi of the Mkhwanazi Traditional Community.

[3] The second respondent in this appeal became the second applicant in the court *a quo* by intervening after the application had been launched. He is Khethukuthula Dalisa Siphelele Mkhwanazi.

[4] In the court *a quo* the first respondent sought an order reviewing and setting aside the decision made by the first appellant in terms of s 19 of the KwaZulu-Natal Traditional Leadership and Governance Act 5 of 2005 (the “Act”) recognising the third respondent as Inkosi of the Mkhwanazi Traditional Community, and an order

directing the first appellant to consult with the first respondent concerning the identification of an Inkosi for that community. Those orders in a slightly amended form, together with orders as to costs against the first and second appellants, were made in the court *a quo*, and are the subject of this appeal.

[5] The issue which gave rise to this litigation was as to who should succeed the late Inkosi Mzondeni Mineus Mkhwanazi who died on 29 August 2007. After a hiatus during which one Siyabonga was nominated as successor, but died in a motor accident without being recognised, on 12 July 2009 the first respondent nominated the second respondent as the person who should be recognised and confirmed as the Inkosi of the Mkhwanazi clan. On 11 October 2009 another meeting of persons who claimed to comprise the Umndeni Wenkosi of the Mkhwanazi Traditional Community nominated the third respondent as the person who should be appointed and recognised as the successor. Both these nominations reached the offices of the first and second appellants where, thus confronted with competing claims, a decision was made to conduct an investigation into the matter. After that investigation had been completed the first appellant made the decision recognising the third respondent as the Inkosi.

[6] It is necessary to give a brief account of the provisions on the Act governing the recognition of an Inkosi. Section 19(1) is the central provision. It reads as follows:

'**19. Recognition of an Inkosi**. – (1) Whenever the position of an *Inkosi* is to be filled, the following process must be followed –

(a) Umndeni wenkosi must, within a reasonable time after the need arises for the position of an *Inkosi* to be filled, and with due regard to applicable customary law and section 3 –

(i) identify a person who qualifies in terms of customary law to assume the position of an *Inkosi* after taking into account whether any of the grounds referred to in section 21 (1) (*a*), (*b*) or (*d*) apply to that person;

(ii) provide the Premier with the reasons for the identification of that person as an *Inkosi*; and

(iii) the Premier must, subject to subsection (3) and section 3, recognise a person so identified in terms of subsection (1) (*a*) (i) as an I*nkosi*.'

[7] The other provisions of the Act referred to in s 19(1) do not feature in the present enquiry. The provisions of s 21 deal with grounds for removal of an Inkosi; subsec (3) requires the Premier to inform the Provincial House of Traditional Leaders of the recognition or appointment of an Inkosi; and s 3 deals with the transformation and adaptation of customary law to comply with the principles enshrined in the Constitution.

[8] Section 19(1) of the Act obliges the Premier to recognise the person identified by the Umndeni Wenkosi as the Inkosi. However s 19(4) qualifies that obligation. It is to the effect that where there is evidence or an allegation that the identification was "not done in accordance with customary law, customs or processes, or was done in contravention of section 3 of this Act" the Premier may seek comment from the Provincial House of Traditional Leaders; or may refuse to issue a certificate of recognition; but must refer the matter back to the Umndeni Wenkosi for reconsideration and resolution if the Premier should decide to refuse a certificate of recognition of the nominee. However a prior question confronted the first appellant in this matter. As two different groupings of persons claimed to constitute the Umndeni Wenkosi, which should be regarded as the true Umndeni Wenkosi? Without an answer to that question there could be no decision as to whether this was a case where the first appellant was obliged to confer recognition, or whether there was a fault line in the identification of the Inkosi by the Umndeni Wenkosi which brought its decision within the ambit of s 19(4) of the Act.

[9] The identification of the correct Umndeni Wenkosi was one of the primary objects of the investigation commissioned by the first appellant. The investigation was conducted by Luthuli Sithole Attorneys ("LSA") who produced a long and detailed report. A reading of the report reveals that it was the product of a very thorough investigation.

[10] The term "Umndeni Wenkosi" is defined in the Act. It means:

'the immediate relatives of an *Inkosi*, who have been identified in terms of custom or tradition, and includes, where applicable, other persons identified as such on the basis of traditional roles.'

[11] In her founding affidavit Ms Gladness Mkhwanazi contended that she (as a wife of the late Inkosi), the mother of the late Inkosi and the children of the late Inkosi (nine persons in all) comprised the Umndeni Wenkosi. In other words, she contended that in the case of the Mkhwanazi Traditional Community the Umndeni Wenkosi was confined to a group of persons she regarded as the "immediate relatives" of the late Inkosi. She also stated that it had come to her attention as a result of other litigation that the appellants took the view that the Umndeni Wenkosi of the Mkhwanazi Traditional Community was differently comprised and consisted of a number of houses, something which she disputed. She claimed to have no knowledge of the circumstances in which the first appellant had formed the view that the Umndeni Wenkosi was constituted by a number of houses. She stated that her ground of review was that the first appellant had failed to comply with the provisions of s 19 of the Act "by disregarding, alternatively, not seeking the identification of an Inkosi by the Umndeni Wenkosi". By that she meant the group she identified as the Umndeni Wenkosi.

[12] In his affidavit delivered in support of his application to intervene, which served as his principal founding affidavit, the second respondent contended that the Umndeni Wenkosi was his late father who had nominated him (the second respondent) as successor. He claimed in the alternative that the Umndeni Wenkosi was constituted as alleged by the first respondent. By the time the second respondent's affidavit was delivered he had access to the record provided by the appellants and to the first appellant's answer to the first respondent's founding affidavit. The record included the report of LSA. It is difficult to pin down, and discern with confidence, the grounds of review advanced in the second respondent's affidavit. But it seems to me that they amount to a contention that the first appellant erred in taking into account any circumstance except the fact (claimed to be true by the second respondent) that he had been nominated as successor by his late father. He contends that taking into account any other information, including anything else contained in the report of LSA, amounted to an irregularity which vitiated the first appellant's decision.

[13] The report of LSA only needs to be summarised in order to identify its role in these appeal proceedings.

(a) It was found that the persons who the first respondent claimed to constitute the Umndeni Wenkosi were not the Umndeni Wenkosi of the Mkhwanazi Traditional Community.

(b) The Umndeni Wenkosi of the Mkhwanazi Traditional Community, according to Mkhwanazi clan custom and tradition, comprises all of the houses that emanate from the ancestor Veyane. The houses recognised by the Mkhwanazi Community as comprising the Umndeni Wenkosi are the Baswazini, Madwalweni, Mahujini, Phodweni, Nomathiya, Hhohho, Nsolweni and Shikishela houses.

(c) According to the custom of the Mkhwanazi Traditional Community all eight houses participate in the decision as to the nomination of an Inkosi. Six of the houses have what the report calls "persuasive powers". But the decision has to be made by the Hhohho and Nomathiya houses, after all the houses have had their say. If there is a deadlock between the Hhohho and Nomathiya houses, then the decision of the Hhohho house will prevail.

(d) It was found that the allegation that the second respondent had been nominated by his late father could be disregarded. It was pointed out that the late Inkosi was fully aware of the decision making powers concerning succession of the Hhohho and Nomathiya houses, and that, if he intended to nominate his successor, his nomination would have been conveyed to those houses. None of the late Inkosi's so-called confidants were members of the Hhohho or Nomathiya houses. (By "confidants" LSA meant those to whom the second respondent's nomination was allegedly conveyed.)

(e) The true Umndeni Wenkosi (i.e. the eight houses) had met and nominated the third respondent. (I use the term "true Umndeni Wenkosi" as a matter of convenience, to distinguish it from the first respondent. This appeal judgment does not decide the dispute over the composition of the Umndeni Wenkosi.)

(f) The nomination of the second respondent was invalid as it was not made by the true Umndeni Wenkosi. For that reason, (and others not presently relevant), that nomination had to be rejected as it was not the one contemplated by the Act.

(g) The report also advised the first appellant not to accept the nomination made by the true Umndeni Wenkosi. In essence that was for two reasons. The first was that the third respondent is not a direct descendent of the late Inkosi. The intention of the true Umndeni Wenkosi was to shift the succession to a line which, in the view of that body of persons, had been wrongly disengaged from the line of succession – i.e. the true Umndeni Wenkosi decided that it was appropriate to restore the leadership of the Mkhwanazi clan to the line wrongly deprived of it. According to the report, whilst a judgment of the Constitutional Court (*Shilubana & others v Nwamitwa* 2009 (2) SA 66 (CC)) had left open the question as to whether this was a legitimate route, the first appellant should not endorse the nomination without taking legal advice as to whether it was open to the true Umndeni Wenkosi to alter the line of succession. Secondly, the report pointed out that if one follows the line of succession favoured by the true Umndeni Wenkosi (comprised of the eight houses), then an older brother of the third respondent should have been nominated following custom which recognises seniority determined by age.

[14] The answering affidavit delivered on behalf of the first appellant recorded the first appellant's acceptance of the proposition that the genuine Umndeni Wenkosi was comprised of the eight houses which had nominated the third respondent (ie what I have labelled the "true Umndeni Wenkosi"). It recorded that the third respondent's older brother had declined to accept the position of Inkosi. (An affidavit by the older brother to that effect was delivered.) It recorded the first appellant's acceptance of the proposition that it was within the power of the true Umndeni Wenkosi to nominate the third respondent as they had done, and that accordingly the first appellant was bound the make the appointment of the third respondent in terms of s 19(1) of the Act.

[15] At the outset in the answering affidavit two issues were raised by the appellants by way of objection to the proceedings.

(a) Firstly, the *locus standi* of the first respondent had not been established. It sued as the "Umndeni Wenkosi" whereas the persons said to constitute that body did not in fact constitute the Umndeni Wenkosi.

(b) Secondly, the body of the persons who nominated the third respondent, and who laid claim to the title of the Umndeni Wenkosi (the one endorsed by the first appellant and by the report of LSA) had not been joined.

[16] In addition, and when all the papers were in, before the court *a quo*, and again before us, the first appellant argued that the papers revealed disputes of fact which had to be resolved in favour of the appellants (as the respondents in the court *a quo*) in the absence of a referral to oral evidence, which was not sought by the first and second respondents (in their capacities as applicants in the court *a quo*). In particular there was a dispute of fact as to how, according to the Mkhwanazi custom and tradition, the Umndeni Wenkosi was constituted for the purpose of nomination of a successor under the Act.

THE JUDGMENT OF THE COURT *A QUO*

[17] It is necessary when summarising the judgment which is the subject of the appeal to mention some aspects of the findings of the court *a quo* with a commentary which does not form the foundation of this appeal judgment. These are mentioned because they feed into the findings which are relevant to the determination of the appeal.

[18] The learned Judge recorded the appellants' objection that the failure to join the true Umndeni Wenkosi constituted a material non-joinder. However she proceeded with her judgment, ultimately in favour of the respondents, without resolving that issue. I will revert to this later.

[19] The learned Judge recorded that during argument counsel for the appellants admitted that the first appellant did not consider the recommendations of LSA. On that basis she found that the first appellant's decision was fatally flawed. One can only conclude that the learned Judge misunderstood a submission made before her by counsel for the appellants. It is clear from the answering papers delivered by the appellants that the report of LSA was considered and indeed informed the appointment of the third respondent. Furthermore, the learned Judge overlooked the fact that the view of LSA that both nominations should be rejected, and the matter referred back, was not an unqualified one when it came to the nomination of the third respondent. The qualifications have already been mentioned above. It should also be observed that this point was not taken by the first respondent. The first respondent failed to supplement its founding papers once the record had been produced. It did not deal with the report of LSA at all. Its sole ground of review was the proposition that the nomination of the third respondent was not a nomination by the Umndeni Wenkosi.

[20] The affidavit of the second respondent (*qua* second applicant in the court *a quo*) was accompanied by one of a Professor Maphalala which was presented as opinion evidence of an expert nature. In response to the papers delivered in support of the second respondent's case a short supplementary answering affidavit was delivered on behalf of the appellants. It recorded that they stood by the contents of their first answering affidavit which they regarded as a sufficient answer to the allegations made on behalf of the second respondent. That put much of what Professor Maphalala had to say with regard to the traditions and customs of the Mkhwanazi community in dispute. Many of the contradictions between the LSA findings and the professor's views concern factual matters. These were not resolved. The learned Judge *a quo* found that both Professor Maphalala as well as the LSA report held that the newly appointed Inkosi had to be a direct descendant of the deceased Inkosi. That is not what the LSA report found, when considered in its totality. It drew attention to the fact that there had previously been a change in the line of succession and that the motivation of the true Umndeni Wenkosi in nominating the third respondent was to restore the line of succession to where it allegedly would have belonged but for the earlier error. The LSA report concluded that it was an open question as to whether under the applicable customary law such

a change was permissible. The learned Judge appears to have misdirected herself on this issue, having mistakenly concluded that the LSA report and Professor Maphalala's views coincided on the issue, a consideration which might have affected her decision that there was no material dispute of fact which needed to be resolved.

[21] The learned Judge found that s 19(4) of the Act was to the effect that where there appeared to be a difference in the identification of an Inkosi, and where it appeared that it may not have been done in accordance with customary law, the Premier was required to refer the matter to the Provincial House of Traditional Leaders for comment, or refuse to issue a certificate, or to refer it back to the Umndeni Wenkosi for reconsideration and resolution. Accordingly, the recognition of the nomination of the third respondent was flawed. In my view the difficulties with this approach are the following:

(a) Firstly, when the conditions for the application of s 19(4) exist, the words used to describe the first appellant's options are as follows. He **may** refer the matter to the Provincial House of Traditional Leaders. He **may** refuse to issue a certificate of recognition. The only thing that he **must** do is refer the matter back to the Umndeni Wenkosi for reconsideration where he has decided to refuse recognition. It is arguable that the first appellant may decide the question of the suitability of the nomination himself.

(b) However it is not clear that the provisions of s 19(4) were engaged on the facts of this matter. Having accepted the LSA report the first appellant was confronted with only one nomination by the Umndeni Wenkosi contemplated by the Act: that is to say the nomination of the third respondent. The fact that the confined grouping identified in the founding affidavit preferred the appointment of the second respondent did not amount to a dispute over the question as to whether the nomination of the third respondent by the true Umndeni Wenkosi was done in accordance with customary law, customs or processes.

[22] Finally, the learned Judge described the first appellant's decision as fatally flawed because he did not "properly consider the composition of the uMndeni

wenkosi", basing his decision on irrelevant considerations and failing to consider relevant ones. However before the court there was a dispute of fact over who comprises the Umndeni Wenkosi. If the first respondent was not the Umndeni Wenkosi, then not considering the nomination made by the first respondent constituted a correct refusal to consider irrelevant material. The failure of the first appellant to take account of the nomination by the first respondent of the second respondent could only be regarded as a ground of review if the dispute over whether the first respondent constituted the Umndeni Wenkosi was resolved in favour of the first respondent.

[23] Having made those observations regarding the reasoning followed by the learned Judge *a quo*, I turn to the issues which dictate the outcome of this appeal.

DISPUTES OF FACT: *LOCUS STANDI* OF THE FIRST RESPONDENT, AND THE CONTENT OF THE CUSTOMS APPLICABLE TO SUCCESSION

[24] The judgment of the court *a quo* does not resolve the factual issue implicit in the argument made by the appellants that the first respondent had not established its *locus standi*. The learned Judge made the observations that the deponent to the first respondent's founding affidavit would in any event personally have had *locus standi* to challenge the decision of the first appellant; and that the *locus standi* of the second respondent was not disputed. The second of these observations did not justify the fact that relief in this matter was granted also to the first respondent.

[25] Insofar as the first of these observations is concerned, it provides no answer because the deponent to the founding affidavit did not sue in her personal capacity. (Neither did the other persons making up what the deponent contended to be the Umndeni Wenkosi sue in their personal capacities.) The issue was not whether, had they done so, they would have had *locus standi*.

[26] However in my view it is not to be doubted that had the deponent to the founding affidavit alone, or in conjunction with the others who she claimed to comprise the Umndeni Wenkosi, sued in their personal capacities, they would have had a right to have their claim to a review of the first appellant's decision adjudicated

upon. But they chose not to sue in those capacities. They approached the court solely upon the basis that they constituted the Umndeni Wenkosi as defined by the Act, and the relevant customary law, customs and processes of the Mkhwanazi Traditional Community. Their right to be heard in that capacity turned solely on the question as to whether they were the Umndeni Wenkosi, as they claimed.

[27] As already apparent from what has been stated in this judgment, a central dispute of fact which had to be resolved in this case was whether the first respondent was the Umndeni Wenkosi. A positive finding would establish the *locus standi* of the first respondent, and, on the papers before us, may well have led inevitably to a judgment in favour of the first respondent, principally on the basis that the first appellant applied the provisions of s 19(1) to a nomination made by a body which was not the Umndeni Wenkosi of the community. (That was the first respondent's stated ground of review.)

[28] Despite the fact that s 211(3) of the Constitution provides that "courts must apply customary law when it is applicable, subject to the Constitution and any legislation that specifically deals with customary law", because of its nature, the application of customary or indigenous law may involve disputes of fact over the customs or processes which are applied within the community in question. Although in *Alexkor Ltd & another v The Richtersveld Community & others* 2004 (5) SA 460 (CC) the Constitutional Court found that it was not required in that case to examine the full range of problems which might arise in disputes over the content of indigenous law, its observations in paragraphs 53 and 54 of the judgment bear repetition.

'[53] In applying indigenous law, it is important to bear in mind that, unlike common law, indigenous law is not written. It is a system of law that was known to the community, practised and passed on from generation to generation. It is a system of law that has its own values and norms. Throughout its history it has evolved and developed to meet the changing needs of the community. And it will continue to evolve within the context of its values and norms consistently with the Constitution.

[54] Without attempting to be exhaustive, we would add that indigenous law may be established by reference to writers on indigenous law and other authorities and sources, and may include the evidence of witnesses if necessary. However, caution must be exercised when dealing with textbooks and old authorities because of the tendency to view indigenous law through the prism of legal conceptions that are foreign to it. In the course of establishing indigenous law, courts may also be confronted with conflicting views on what indigenous law on a subject provides. It is not necessary for the purposes of this judgment to decide how such conflicts are to be resolved.' (footnotes omitted.)

[29] Against that background the following observations made by Van Der Westhuizen J in *Shilubana & others v Nwamitwa* 2009 (2) SA 66 (CC) are instructive.

'[46] It follows that the practice of a particular community is relevant when determining the content of a customary-law norm. As this court held in *Richtersveld*, the content of customary law must be determined with reference to both the history and the usage of the community concerned. "Living" customary law is not always easy to establish and it may sometimes not be possible to determine a new position with clarity. Where there is, however, a dispute over the law of a community, parties should strive to place evidence of the present practice of that community before the courts, and courts have a duty to examine the law in the context of a community and to acknowledge developments if they have occurred.' (footnotes omitted.)

[30] This case involves a dispute of fact as to which persons or groups of persons comprise the Umndeni Wenkosi of the Mkhwanazi Traditional Community for the purposes of nominating a successor to a deceased Inkosi. The first and second respondents differ on this issue. (However the second respondent defers to the views of those who claim to comprise the first respondent if his primary view, that his father alone comprised the Umndeni Wenkosi because of an alleged nomination made during his lifetime, is rejected.) The report of the LSA, which is adopted as correct by the first appellant, identifies what I have called the true Umndeni Wenkosi (which included representatives of the Hhohho and Nomathiya houses) as the body or institution contemplated by the Act.

[31] The first and second respondents contend that the successor may only come from the direct line of the deceased Inkosi. The LSA report, properly construed, conveys that that may be so, but that it may also be that a change of line is permissible, presumably in certain circumstances. The LSA report reveals that as a matter of fact the line of succession contended for by the first and second respondents is the product of an earlier decision to change the line of succession. It may be of some relevance to the community, and its understanding of its customs and processes, that all the true Umndeni Wenkosi was attempting to achieve was the restoration of the original line of succession, and it may be that the community regards that as proper either:

(a) because absolute adherence to the existing line of succession is no longer a feature of the customs of the community, and accordingly of the applicable customary law; or

(b) because it adheres to the principle that only the direct line of succession from the deceased Inkosi should be recognised, and that if there has been a previous breach of that principle, it must be corrected.

[32] In my view neither the dispute over the composition of the Umndeni Wenkosi nor the dispute over whether a change in the line of succession was permissible under the customs of the Mkhwanazi Traditional Community could have been resolved without oral evidence.

[33] These matters were argued in the court *a quo* where the first and second respondents did not ask that the disputes be referred to oral evidence. The argument for the appellants in particular was that as a matter of fact the deponent to the founding affidavit, and those she identified as the “immediate family” of the deceased Inkosi, did not constitute the Umndeni Wenkosi of the community. The usual rule in these circumstances (that stated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)) applied, and the court ought to have held that on the papers the first respondent was not the Umndeni Wenkosi it claimed to be, and that the change of line of succession evidenced by the nomination of the

third respondent was sanctioned by the applicable customary law, as contended by the first appellant.

NON-JOINDER

[34] The appellants have argued, correctly in my view, that the effect of s 19(1) of the Act is that the first appellant is bound to endorse the nomination of a successor by the Umndeni Wenkosi unless the circumstances contemplated by s 19(4) are present. For that reason the decision of the first appellant to recognise the third respondent is only nominally the target of the review proceedings. As far as I can see all of the arguments raised by the first and second respondents before the court *a quo*, and dealt with by the learned Judge in her judgment, rest their claims for validity on one or both of the propositions that:

(a) what I have called the "true Umndeni Wenkosi" is in fact not the Umndeni Wenkosi; and
(b) the customary law applicable in the Mkhwanazi Community does not permit the Umndeni Wenkosi to make a nomination which has the effect of changing the line of succession.

Both of these arguments, and an order such as was granted by the court *a quo*, were matters in respect of which the true Umndeni Wenkosi had a real and substantial interest. The respondents sought to challenge the very existence of the true Umndeni Wenkosi, and overturn a decision which the true Umndeni Wenkosi had made. Given the provisions of s 19(1), the nomination of a successor by an Umndeni Wenkosi has legal effect.

[35] In my view the need to join the true Umndeni Wenkosi was implicitly acknowledged, but ignored in the founding papers. If it is correct that when launching the application the first respondent was uncertain as to whose joinder was required, that issue was solved when the record of the proceedings was provided by the appellants. And yet no supplementary affidavit was delivered dealing with the record, and no application to join was made. The issue of non-joinder was

pertinently raised by the appellants in the first answering affidavit delivered on behalf of the first appellant. It was ignored by the first and second respondents.

[36] The second of the tests enunciated in the judgment of *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 661 applies. Putting aside the dispute as to the composition of the genuine Umndeni Wenkosi of the Mkhwanazi Community, the true Umndeni Wenkosi would have had as much right to approach this court to direct the first appellant to act under s 19(1) of the Act (if he had failed to do so), as the first and second respondents claimed to have to approach the court to set aside the action actually taken by the first appellant under s 19(1) of the Act.

[37] In this case the learned Judge *a quo* proceeded to hear the case and deliver a judgment notwithstanding that there was a material non-joinder. In our law, once it is established that the absent party is a necessary party, no question of a discretion or of convenience arises. The court may not deal with the issues without joinder being effected. (See *Khumalo v Wilkins & another* 1972 (4) SA 470 (N) at 475A-B, and the cases referred to there.)

[38] The question remains as to what is to be done in the light of the fact that the matter has reached the appeal stage. In the past, in the interests of avoiding "as far as it may be at all possible, the necessity of causing the parties unnecessary trouble, expense and delay" (see *Amalgamated Engineering* at 663), appeal courts have crafted a process by which the final appeal judgment is withheld in order to give the absent necessary party an opportunity to indicate whether it would regard itself as bound by any appeal judgment. (See also *Eden Village (Meadowbrook) (Pty) Ltd & another v Edwards & another* 1995 (4) SA 31 (A) at 47.) However that course is not obligatory. (See *ABSA Bank Ltd v Naude NO & others* 2016 (6) SA 540 (SCA) para 11.)

[39] In my view the issue as to what is to be done in consequence of the non-joinder of the true Umndeni Wenkosi falls away because the appeal must be upheld on the ground that the disputes of fact already discussed above had to be resolved, and were not resolved, by oral evidence during which the conflicting views and

assertions which litter the papers could be properly interrogated. Nevertheless, I express the view that this would otherwise be a case where it would be proper for this appeal court to uphold the appeal merely upon the basis that the true Umndeni Wenkosi was not joined. It is clear on the papers that the decision not to join it was deliberately made. It is difficult to resist the conclusion that the persons who claim to comprise the first respondent sought to afford no recognition at all to the prospect that there might be another body of persons (identified in the minutes annexed to the LSA report) which could claim to constitute the Umndeni Wenkosi contemplated by the Act. It is questionable as to whether one can say that a party adopting that view is entitled to have the court become concerned about causing unnecessary trouble, expense and delay by keeping the case alive, either by inviting the absent necessary party to join the appeal or, as would be more appropriate in this case, remitting the matter to the court *a quo* to hear the case afresh after the missing necessary party has been joined.

COSTS

[40] The question arises as to whether the ordinary rule that success is accompanied by a favourable costs order should apply in this case. In the case of *Shilubana*, where the issue was not dissimilar to the one in this case, the court held for a number of reasons, including the fact that the case served to clarify several important points of customary law in the interests of the affected community, that there should in effect be no order as to costs. In this case such clarity has not been achieved, because of the basis upon which it is proposed to uphold the appeal. However, in my view it would not be fair to hold merely on the papers that the parties to this litigation have not been motivated at least substantially by what they perceive to be the furthering of the interests of the Mkhwanazi Community. It is appropriate that there should be no order as to costs.

ORDER

(1) (a) The appeal is upheld.

(b) There is no order as to the costs of the appeal.

(2) The order of the court *a quo* is set aside and substituted with the following order:

"(a) The application is dismissed.

(b) There is no order as to costs."

Olsen J

Moodley J

Chetty J

Date of Hearing:	FRIDAY, 06 DECEMBER 2019
Date of Judgment:	TUESDAY, 19 MAY 2020
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